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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GULF COAST INDUSTRIAL WORKERS UNION,
Petitioner,
v.
EXXON COMPANY, U.S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

DOUGLAS B. NEAGLI *
EXXON COMPANY, U.S.A.
800 Bell, Suite 1839
Houston, Texas 77002
(713) 656-4333

KEITH A. JONES
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200
Counsel for Respondent

* Counsel of Record

Of Counsel:

GIBSON GAYLE, JR.
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney
Suite 5100
Houston, Texas 77010-3095
(713) 651-5326

October, 1993

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QUESTIONS PRESENTED

1) Whether the arbitrator exceeded his authority by basing a finding of just cause for discharge on evidence of the employee's post-discharge conduct.

2) Whether well-defined and dominant public policy justified refusal to enforce the arbitrator's award reinstating a known alcoholic and present drug-user to a safety-sensitive position in a petro-chemical refinery.*

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* Exxon Company, U.S.A. is a division of Exxon Corporation. In accordance with Supreme Court Rule 29.1, a list of companies that are subsidiaries of Exxon Corporation is attached as an Appendix. This list excludes wholly owned subsidiaries and companies in which Exxon owns less than a 5% interest.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Thomas Woods worked as a process technician at a refinery owned by respondent Exxon Company, U.S.A. ("Exxon") in Baytown, Texas. Exxon terminated Woods in 1990 after he tested positive for cocaine in an unannounced drug test. Petitioner Gulf Coast Industrial Workers Union ("GCIWU") seeks to get Woods' job back.

During his last several years of employment, Woods encountered chronic problems with alcohol that adversely affected his job (Pet. App. C, pp. 4-5). He finally entered an in-patient treatment program for alcoholism in March of 1990 (*Id.*).

Exxon's Alcohol and Drug Use Policy requires employees who have gone through an alcohol rehabilitation program to participate in a mandatory "after-care" program. The after-care program has many provisions, including the following: a requirement that participants completely abstain from alcohol and non-prescription drugs; a requirement that if they relapse or feel they are about to relapse, they must notify their supervisor or after-care counselor; and a provision for random, unannounced drug and alcohol testing for a five year period. Employees in an after-care program clearly understand that violation of their after-care agreement constitutes grounds for discharge. However, the after-care program recognizes that relapses sometimes occur, and instructs the employee what to do in such situations; if the employee follows the program and notifies his supervisor of a relapse prior to a request for testing, Exxon will likely provide him a second chance (Pet. App. C, pp. 16-17).

Upon returning to work after his treatment, Woods agreed to an after-care program containing these provisions. Less than *two months* into his after-care program, Woods tested positive for cocaine in a drug and alcohol screen. Contrary to his after-care agreement, Woods had not notified his supervisor or an after-care counsellor of his relapse. In fact, Woods did not admit to using cocaine until after he learned the test results were positive, approximately three days later (*Id.*, p. 10).

Woods had violated the after-care agreement and Exxon's Alcohol and Drug Use Policy in two respects: (1) his positive test and later admitted use of cocaine violated both the Policy and his after-care agreement's "complete abstinence" vow; and (2) the fact that Woods did not admit cocaine use until after the test results came back violated his agreement to notify his supervisor or counselor of a relapse prior to a request for

testing (Pet. App. C, pp. 4, 10, 25). Because of these violations, Exxon terminated Woods' employment.[1]

The GCIWU represents Woods and other process technicians at the refinery. The GCIWU filed a grievance concerning Woods' termination and later requested arbitration. An arbitrator ordered Exxon to reinstate Woods to his process technician position. The GCIWU filed suit to enforce the award, and Exxon filed a counter-claim to vacate it. On cross-motions for summary judgment, the district court vacated the award (Pet. App. D). The Fifth Circuit, in an opinion by Judge Jerre S. Williams, in which Judges Higginbotham and Barksdale joined, affirmed. (Pet. App. A).

The Fifth Circuit rested its decision on two grounds: (1) in deciding whether Exxon had just cause to discharge Woods, the arbitrator exceeded his authority by relying on assertions regarding Woods' "post-discharge good works"; and (2) the award violated the public policy against reinstating an alcoholic and drug abuser to a safety-sensitive job.

REASONS FOR DENYING THE WRIT

I. THE ARBITRATOR IMPROPERLY CONSIDERED POST-DISCHARGE CONDUCT IN DETERMINING EXXON HAD NO JUST CAUSE TO TERMINATE WOODS

The law is clear, and the GCIWU does not dispute, that arbitrators are bound by the terms of the Collective Bargaining Agreement. They do not sit to "dispense their own brand of industrial justice," and their award is

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[1] The GCIWU asserts at various places in its petition that Woods "allegedly" violated the Policy and contests whether Woods violated the Policy and the after-care agreement in both respects. The arbitrator specifically found Woods violated the Policy both by using cocaine and testing positive and by failing to notify his supervisor or his counsellor of his relapse (Pet. App. C, pp. 24-25).

legitimate "only so long as it draws its essence from the Collective Bargaining Agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). Here, Article Twenty-six of the Collective Bargaining Agreement (Pet. App. B, pp. 20-21) provides that Exxon "shall have the right to discipline and discharge employees for *just cause*" (*id.*, p. 20) (emphasis added). Exxon argued below, and the district court and the Fifth Circuit agreed, that in deciding just cause under the Collective Bargaining Agreement an arbitrator may look *only* at the facts and evidence as they existed at the time of the termination decision.

The Fifth Circuit's ruling on this issue conforms with the decisions of all the other federal courts of appeals that have considered the matter. *Delta Airlines, Inc. v. Airline Ass'n, Int'l*, 861 F.2d 665, 669 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989), citing *Butterkrust Bakeries v. Bakery Confectionary and Tobacco Workers Int'l Union*, 726 F.2d 698 (11th Cir. 1984) (arbitrator bound to decide just cause for discharge based upon facts existing at the time of discharge); *Mobil Oil Corp. v. Independent Oil Worker's Union*, 679 F.2d 299, 303 (3rd Cir. 1982) (arbitrator can consider only evidence relating to the facts at time of discharge); *International Ass'n of Machinists & Aerospace Workers v. San Diego Marine Constr. Corp.*, 620 F.2d 736, 739 (9th Cir. 1980) (mention by arbitrator of post-discharge conduct permitted inference that arbitrator exceeded his authority).

The GCIWU argues that the Fifth Circuit misapplied this well-settled rule to the facts of this case, contending that the arbitrator actually first found that there was no just cause for termination and then looked at Woods' post-discharge conduct to fashion an appropriate remedy. This is clearly incorrect. The arbitrator looked specifically at Woods' post-discharge conduct in finding no just

cause (Pet. App. C, pp. 18-21, 25-32). Indeed, the GCIWU had argued below that it was appropriate for the arbitrator to do so.

In particular, the arbitrator considered the GCIWU's allegations concerning Woods' post-relapse drug and alcohol abstinence, employment, and lifestyle changes (Pet. App. C, pp. 18-21). Then, after stating that the existence of just cause depended on whether Woods was "judged to be a good bet for successful rehabilitation" (*Id.*, p. 28), the arbitrator expressly relied upon those allegations in making that judgment: "Since his relapse he seemingly has learned better how to deal with his environment. He has attended AA meetings, held a job and learned how to live 'one day at a time.'" (*Id.*, p. 30). Thus, the arbitrator plainly did rely upon post-discharge conduct in determining just cause. The Fifth Circuit did not misapprehend the facts.

The GCIWU further argues (as it did below) that an arbitrator may in fact look at evidence of post-discharge conduct in determining the existence of just cause. However, the cases the GCIWU cites are not on point. For instance, the GCIWU mistakenly seeks to draw support from a previous Fifth Circuit case, *Oil Chem. and Atomic Workers Int'l Union v. Union Oil Co.*, 818 F.2d 437 (5th Cir. 1987), *cert denied*, 486 U.S. 1014 (1988) (Pet., pp. 43-44). Of course, even if, as the GCIWU apparently contends, there is an intra-circuit conflict, that would not warrant a grant of certiorari. In any event, at bottom, *Union Oil* stands for the proposition that although an arbitrator may treat post-discharge drug use as confirmation of the reasonableness of a discharge, he cannot treat post-discharge rehabilitation as rendering a reasonable discharge unreasonable after the fact. *Union Oil*, 818 F.2d at 443. Thus, *Union Oil* clearly does not support the GCIWU's argument here.

The GCIWU also makes passing reference to *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d

1200 (9th Cir. 1989), *cert. denied,* 495 U.S. 496 (1990) (Pet., p. 49). However, *Stead Motors* also clearly differs from this case. In *Stead Motors,* the Ninth Circuit stated that once an arbitrator finds there was no just cause for discharge, he *then* may consider post-discharge conduct in prescribing an appropriate remedy. That is manifestly *not* the procedure followed by the arbitrator here.

In short, the Fifth Circuit in this case correctly disapproved the arbitrator's improper reliance upon post-discharge conduct. No actual conflict among the circuits exists on this point, and the GCIWU alleges none. The Fifth Circuit's holding on this issue, therefore, plainly warrants no further review. Because that holding constituted a fully dispositive ground for the judgment below, this Court can and should deny the petition on the basis of that consideration standing alone. As we now demonstrate, moreover, the other issue decided by the Fifth Circuit similarly warrants no further review.

II. WELL-DEFINED AND DOMINANT PUBLIC POLICY REQUIRED VACATION OF THE ARBITRATOR'S AWARD

As an alternative ground for vacating the award, the Fifth Circuit articulated and supported a well-defined and dominant public policy militating against reinstatement of an employee to his safety-sensitive position after the employee tests positive for alcohol or drugs on the job. The court then applied that public policy to the facts of this case and properly affirmed the district court's vacation of the award.

The Fifth Circuit ascertained this public policy from the numerous federal and state statutes and various federal regulations aimed at eliminating the effect of drugs and alcohol in the workplace. (Pet. App. A, pp. 27-36). In particular, the court noted that 48 C.F.R. § 252.223-

7004(d) (1992) expressly provides that a government contractor like Exxon "shall not allow any employee to remain on duty or perform in a sensitive position who is found to use illegal drugs until such times as the contractor . . . determines that the employee may perform in such a position." Woods' position as a process technician unquestionably was "sensitive" within the meaning of this regulation. As the Fifth Circuit noted:

> [P]etro-chemical refineries are dangerous places; there is no margin for error . . . Woods' duties as a process technician at the refinery involved the potential handling of high-pressure and high-temperature liquids and gases. Such assignments have the capacity to place thousands of people, as well as the surrounding environment, at risk.

(Pet. App. A, pp. 41-42). Nonetheless, the arbitrator improperly ordered Woods reinstated to that sensitive position, notwithstanding Exxon's determination that Woods could not perform in that position. In so doing, the arbitrator plainly disregarded both the federal regulation and public policy.[2]

While the remaining statutes and regulations invoked by the Fifth Circuit do not *expressly* prohibit Woods'

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[2] Although the GCIWU did not contest this point below, it now denies that Woods worked in a safety-sensitive position and argues that the Fifth Circuit improperly engaged in "fact finding." That allegation, which of course would not warrant review on certiorari even if plausible, is incorrect. The Fifth Circuit's description of Woods' duties—"Woods was not a desk bound employee. As a process technician, he was freely transferable into assignments involving the supply of electricity, steam, water and nitrogen to other parts of the plant. These volatile gases and liquids are produced and handled at extremely high temperatures and pressures" (Pet. App. A, 4)—derived directly from the GCIWU's own reply brief in the court of appeals. The Fifth Circuit reasonably relied on this description, other cases, arbitration awards, and basic common sense to conclude that petro-chemical refineries are dangerous places where there is no "margin for error" (Pet. App. A, p. 41).

reinstatement, the strong public policy underlying them—that of protecting co-workers, the environment and the public from the hazards caused by drugs and alcohol on the job—strongly argues against reinstatement on the facts of this case. Alcohol and drug use continue to be one of the most serious problems facing our nation today. These statutes and regulations focus on eliminating the impact of drugs and alcohol from safety-sensitive jobs. Woods' reinstatement would severely undermine this objective by condoning his illegal use of cocaine. *See Newsday, Inc. v. Long Island Typographical Union,* 915 F.2d 840 (2d Cir. 1980), *cert. denied,* 111 S. Ct. 1314 (1991) (reinstating sexual harasser condones such conduct and prevents the employer from carrying out its legal duty to eliminate sexual harassment in the workplace); *Stroehmann Bakeries, Inc. v. International Bhd. of Teamsters,* 969 F.2d 1436, 1442 (3rd Cir. 1992).

The Fifth Circuit also looked to this Court's opinion in *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29 (1987), and the decisions of other circuits in articulating and ascertaining this public policy. The court of appeals followed closely the teaching of these cases in reaching its decision.

In *Misco,* this Court reaffirmed that courts may vacate arbitration awards on public policy grounds. 484 U.S. at 42-43, *citing, W.R. Grace & Co. v. International Union of United Rubber Workers,* 461 U.S. 757 (1983).[3] While

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[3] The GCIWU incorrectly contends that the decision below runs counter to the public policy favoring orderly resolution of labor disputes through arbitration. (Pet., pp. 21-28). Arbitration awards are not inviolate: Courts may vacate awards "[w]here the arbitrators exceeded their powers . . . ." *Federal Arbitration Act,* 9 U.S.C. 10(d) (1947); *Misco,* 484 U.S. at 40, n.9. The courts have clearly defined when an arbitrator exceeds his or her powers: "An arbitration award will not be enforced . . . if it concerns a matter not subject to arbitration under the contract; or if it violates public policy." *Manville Forest Products Corp. v. United Paperworkers Int'l Union,* 831 F.2d 72, 74 (5th Cir. 1987) (cita-

the Court then reversed the vacation of an arbitration award which had reinstated a discharged paper-mill employee, its reasons for doing so find no counterparts here or in other cases vacating awards on public policy grounds. The Supreme Court cited the following reasons for its reversal in *Misco*: the reviewing court's failure specifically to set forth the laws and legal precedents upon which the asserted public policy was based; the absence of a conclusive record basis for inferring on-the-job drug use, possession, or a positive test in the workplace; and the fact that the award gave the company the option of returning the terminated employee to a job where he posed no threat to the public.

Cognizant of this holding, the Fifth Circuit and each of the courts addressing this issue following *Misco* have articulated and provided support for a well-defined and dominant public policy against the reinstatement of an employee in circumstances similar to the case at hand: reinstatement to a safety-sensitive position; alcohol or drug use; an on-the-job positive test or conduct; and no ameliorative action by a regulatory body charged with overseeing the position and conduct in question. When these factors exist, the courts have vacated awards.

For example, in *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3rd Cir. 1993), the Third Circuit vacated an arbitrator's award reinstating to his former

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tions omitted). *See also, W.R. Grace*, 461 U.S. at 766 (courts will not enforce collective bargaining agreements that are contrary to public policy). Furthermore, as the GCIWU admitted in its brief to the Fifth Circuit, courts properly may accord less deference to arbitration awards which affect public safety. *See also, E. I. DuPont de Nemours v. Graselli Employees Indep. Assoc.*, 790 F.2d 611, 617 (7th Cir.), *cert. denied*, 484 U.S. 985 (1987); *Exxon Shipping Co. v. Exxon Seaman's Union*, 788 F. Supp. 829, 841 (D. N.J. 1992), *aff'd*, 993 F.2d 357 (3rd Cir. 1993). The enormous public risks entailed by permitting a drug user to work in a large petro-chemical refinery clearly gave the court below this broader discretion here.

position a helmsman whom Exxon Shipping had terminated after he tested positive for marijuana in a post-grounding drug test. The court found that the terminated employee's position substantially affected public safety. The Third Circuit then looked to numerous Coast Guard regulations, various statutes and other cases to find a "well defined and dominant public policy against the operation of a vessel under the influence of drugs or alcohol". *Id.* at 362.

Similarly, the Eleventh Circuit in *Delta Airlines* considered numerous federal and state statutes, regulations, and cases before concluding that an arbitration award reinstating a pilot discharged for flying a passenger plane with alcohol in his bloodstream clearly violated established public policy. The court, in vacating the award, specifically noted that the pilot was intoxicated while performing tasks "integral to the performance of employment duties." 861 F.2d at 671.

The cases cited by the GCIWU differ substantially. None satisfies each of afore-mentioned criteria or conflicts with the decision below.

The GCIWU relies primarily on *Northwest Airlines, Inc. v. Airline Pilots Ass'n Int'l Union,* 808 F.2d 76 (D.C. Cir. 1987). In *Northwest Airlines,* the D.C. Circuit found that the award did not violate public policy because the arbitrator conditioned a pilot's reinstatement on a requirement of two years' abstinence *and* the Federal Aviation Administrator's recertification of the pilot as fully fit and licensed to fly. *Id.* at 83. The case clearly differs from those of the Fifth, Sixth and Eleventh Circuits because, in effect, the award *followed* public policy. As stated by the court: "[I]t would be patently absurd for us, under the guise of 'public policy' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue." *Id.* Here the arbitrator did not condition Woods' reinstatement

on recertification by or refer the matter to an administrative agency.

The GCIWU also relies on the Ninth Circuit's decision in *Stead Motors*. Again, that case clearly differs. There, the employer could not identify strong public policy firmly grounded in positive law. Further, the "public policy" argued in *Stead Motors* had nothing to do with the improper use of alcohol or drugs on the job. Moreover, the case did not involve a safety-sensitive position akin to that of an airline pilot, process technician in a refinery, or helmsman on a super tanker; rather, the aggrieved employee in *Stead Motors* was an auto-mechanic who negligently failed to tighten lug nuts on a Mercedes-Benz. The Ninth Circuit's holding that public policy does not preclude reinstatement in those circumstances does not imply that it would have reached a similar conclusion under the very different facts and public policy concerns presented here.

The third case on which the GCIWU relies, *Interstate Brands Corp. v. Chauffeurs Teamsters Warehouseman & Helpers Local Union*, 909 F.2d 885 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1104 (1991), is similarly distinguishable. There, the Sixth Circuit found no law or public policy barring reinstatement of a delivery van driver terminated for off-the-job drug possession. That case clearly differs from one like this, involving an on-duty positive drug test by a recovering alcoholic in a safety sensitive position in a petro-chemical refinery.[4]

Similarly, the GCIWU's reliance on the Fifth Circuit's decision in *Union Oil* misses the mark. The court did not

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[4] The GCIWU properly does not rely upon another clearly distinguishable Sixth Circuit decision, *Monroe Auto Equip. Co. v. United Automotive, Aerospace and Agric. Implement Workers*, 981 F.2d 261 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2396 (1993). The experimental auto-part installer/tester in *Monroe* had little public contact, and like the van driver in *Interstate Brands*, obviously was not in a safety sensitive job on a par with that of Woods, an airline pilot, or the helmsman on a super tanker.

reject the company's public policy arguments in that case, which in any event involved exclusively off-duty conduct.

For all these reasons, the Fifth Circuit correctly held that well defined and dominant public policy required vacation of the arbitrator's award in this case. There is no conflict, and the decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS B. NEAGLI *
EXXON COMPANY, U.S.A.
800 Bell, Suite 1839
Houston, Texas 77002
(713) 656-4333

KEITH A. JONES
FULBRIGHT &
JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200
Counsel for Respondent

* Counsel of Record

Of Counsel:

GIBSON GAYLE, JR.
FULBRIGHT &
JAWORSKI L.L.P.
1301 McKinney
Suite 5100
Houston, Texas 77010-3095
(713) 651-5326

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